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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIE L. LEWIS,

Petitioner,

v.

HILLSBOROUGH TRANSIT AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR CERTIORARI

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APPELLANT'S PETITION FOR CERTIORARI

Petitioner Willie L. Lewis prays the Supreme Court to grant a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court of Appeals ruled that the Petitioner was not denied due process of law as required by the Fourteenth Amendment even though he was dismissed from his job as a bus driver without an opportunity to respond to the charges against him either prior to or subsequent to his discharge. His attempts to appeal his dismissal through his Union were blocked and his attorney's request to the Hillsborough Transit Authority for a formal hearing was denied. Lewis v. Hillsborough Transit Authority, No. 83-3156, slip op. at 1959, ____ F.2d _____ (11th Cir. December 5, 1983) reh. den., Lewis v. Hillsborough Transit Authority, No. 83-3156, slip op. at 1963, _____ F.2d _____ (11th Cir. March 9, 1984).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Eleventh Circuit Court of Appeals' holding that Plaintiff's failure to exhaust the available administrative remedies by not using collective bargaining agreement grievance procedures precluded him from prevailing in a violation of due process action pursuant to

42 U.S.C. §1983 is in conflict with the decision of the United States Supreme Court in Patsy v. Board of Regents of the State of Florida and Monroe v. Pape.

2. Whether the United States Eleventh Circuit Court of Appeals by not applying the provisions of Florida Statute §447.401 acted in contradiction to the ruling of the United States Supreme Court in Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938).

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REFERENCE TO THE OPINIONS OF THE COURTS BELOW

Lewis v. Hillsborough Transit Authority, No. 81-885-Civ-T-WC (M.D. Fla. Dec. 8, 1982).

Lewis v. Hillsborough Transit Authority, No. 83-3156, slip op. at 1959, _____ F.2d _____ (11th Cir. Dec. 5, 1983); rehearing denied, Lewis v. Hillsborough Transit Authority, No. 83-3156, slip op. at 1963, _____ F.2d _____ (11th Cir., March 9, 1984).

STATEMENT OF JURISDICTION

The Jurisdiction of this Court is invoked pursuant to Rule 17(1)(c) of the Rules of the Supreme Court of the United States. The holding of the United States Eleventh Circuit Court of Appeals in Lewis v. Hillsborough Transit Authority, _____ F.2d _____, (11th Cir., December 5, 1984); rehearing denied Lewis v. Hillsborough Transit Authority, _____ F.2d _____, (11th Cir., March 9, 1984), contradicts this Courts holding in Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982), and Monroe v. Pape, 365 U.S. 167 (1961), and Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938).

CITATION OF APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. CONST. Amend. XIV

42 U.S.C. §1983

FLA.STAT. §447.401 (1981)

STATEMENT OF THE CASE

This is an appeal from the decision of the Eleventh Circuit of the United States Court of Appeals entered March 9, 1984 denying Petitioner's request for rehearing, and an appeal from the Eleventh Circuit's judgment affirming the judgment of the United States District Court, Middle District, entered December 5, 1983 in favor of the Defendants Hillsborough Transit Authority and agains the Petitioner Willie L. Lewis.

1. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

On September 21, 1981, the Petitioner Willie Lewis filed a complaint against the Hillsborough Transit Authority (hereafter HTA), and three individual members of its management, and Fireman's Fund Insurance Company in United States District Court Middle District of Florida. (R. 1). The Petitioner invoked the jurisdiction of the district court under 42 U.S.C. §1983 and 28 U.S.C. §1343.

The district court on April 21, 1981 granted Defendant Fireman's Fund Insurance Company's Motion to Dismiss. The district court denied the Motion to Dismiss filed by the Defendant HTA, and the three individual members of its management. (R. 68-9). At trial, on October 12, 1982, Petitioner amended his complaint, and withdrew his claims

against the three individual Defendants. The case was tried in a non-jury trial before the Honorable William J. Castagna.

On December 8, 1982, the district court entered final judgment against the Petitioner Willie L. Lewis, and in favor of the Defendant HTA. In its opinion, the district court held that although the Petitioner had a vested property interest in his continued employment by virtue of his former civil servant status with the City of Tampa, the Petitioner was not denied due process because he could have used the grievance procedures provided in the collective bargaining agreement between the City of Tampa and Local 1464. (R. 140, 143).

The Petitioner filed a motion for a new trial on December 20, 1982. (R. 143). This motion was denied by the district court on January 13, 1983. (R. 161). The Petitioner then filed his timely notice of appeal to the Eleventh Circuit Court of Appeals on February 10, 1983. (R. 161). On December 5, 1983, the Eleventh Circuit ruled against the Petitioner Willie Lewis and in favor of the Defendant HTA.

The Court of Appeals ruled that the Defendant HTA provided Lewis with adequate due process by sending him a

letter containing the reasons for his termination, and making his Union's grievance procedures available to him. The Court further ruled that the Petitioner could not complain about deficiencies in union grievance procedures because he did not attempt to utilize the grievance machinery. The Eleventh Circuit stated that if the Petitioner's argument was accepted, every employee would be entitled to ignore the grievance mechanisms and to sue in federal court. Lewis v. Hillsborough County Authority, No. 83-3156, slip op. at 1961, _____ F.2d _____, (11th Cir., Dec. 5, 1983) at page 4.

On December 22, 1983, the Petitioner filed his suggestion for an en banc rehearing. On March 9, 1984 the Eleventh Circuit denied Petitioner's request for a rehearing of his appeal. The Eleventh Circuit held that the Union's collective bargaining agreement and Tampa's civil service rules provided the Petitioner with sufficient due process. Lewis v. Hillsborough Transit Authority, _____ F.2d _____ (11th Cir., Mar. 9, 1984).

On May 8, 1984, Petitioner submitted this Petition for Certiorari.

2. STATEMENT OF THE FACTS.

The Petitioner, Willie Lewis was hired by the City of Tampa as a bus driver in 1971 when the City took over the operation of the transit system. The Petitioner continued to work for the City of Tampa until the Defendant Hillsborough Transit Authority (HTA) succeeded the City in operation of the bus system. (Tr. 38). All during the time in which the Petitioner worked for the City of Tampa, he was provided with certain rights and job security by the City of Tampa Civil Service Board and the collective bargaining agreement which existed between the City of Tampa and Local 1464 of the Amalgamated Transit Union. (Tr. 31). When the HTA came into existence on March 1, 1980, the Defendant HTA agreed to preserve the benefits and rights that its employees had as civil servants, and under the collective bargaining agreement between the City of Tampa and Local 1464. (Tr. 25-6, 31-2).

On June 11, 1981, the Petitioner was involved in a motor vehicle accident while operating a bus for the Defendant HTA. The Petitioner was transported to the hospital and released later that day. (Tr. 90). On the day following the accident, the dispatcher for the Defendant HTA contacted the Petitioner and learned that he was still sore and was unable to return to work. (R. 119).

Fireman's Fund Insurance Company, the Workers' Compensation Carrier of the Defendant HTA, scheduled an examination of the Petitioner by Dr. James Eckart for July 2, 1981. (Tr. 80-1). Dr. Eckart failed to find any objective physical findings, and concluded that the Petitioner could return to work. Dr. Eckart sent a report of his findings to Fireman's Fund.
(Tr. 132-3).

The Petitioner was also examined on July 2, 1981 by his treating physician, Dr.Angelo Alves. Dr. Alves advised the Petitioner not to return to work for thirty days. (Tr. 134). Dr. Alves forwarded a report of his examination to Fireman's Fund, but not to the Petitioner's employer, the Defendant HTA. Dr. Alves also gave the Petitioner a note indicating that he would be physically unable to return to work until August of 1981. Mr. Lewis took the note to his attorney's office.

Fireman's Fund Insurance Company received both doctor's reports, but elected to use Dr. Eckart's report as the basis for terminating Workers' Compensation benefits. (Tr. 87). Fireman's Fund forwarded a Workers' Compensation form to the Defendant HTA which indicated that the disability benefits were being terminated per Dr. Eckart's report. (Tr. 87).

Fireman's Fund did not inform the Defendant of Dr. Alves' report which stated that the Petitioner was unable to return to work. (R. 119).

Upon receipt of the workers' compensation form the Defendant HTA terminated the Petitioner's employment pursuant to Article 7.4 of the collective bargaining agreement that existed between Local 1464 and the City of Tampa. (Tr. 95-6). Article 7.4 provided that an employee who was absent without leave for three consecutive days may be considered as "resigned without notice." (Tr. 29).

Mr. Lewis testified that he received the HTA's termination letter on August 3, 1983, and immediately sought the help of Local 1464. Petitioner was told that his Union could not help him because he had already obtained an attorney. (Tr. 55). Mr. Lewis' attorney wrote a letter to the HTA explaining that the Petitioner had not voluntarily resigned, but was merely following Dr. Alves' order. Since the Petitioner was told that his Union would not help him, the Petitioner's attorney made a formal request for an administrative hearing if the HTA refused to reinstate the Petitioner.

(R. 13). The HTA responded by stating that the Petitioner would still be considered to have voluntarily resigned because he had failed to contact the HTA and report his inability to return to work. (Tr. 99-100). Since the Defendant failed to provide the Petitioner with a pre-termination or post-termination hearing, the Petitioner commenced his §1983 action in district court. (R. 1).

STATEMENT OF BASIS FOR FEDERAL JURISDICTION IN THE COURT BELOW

The Jurisdiction of the courts below was invoked under 28 U.S.C. §1343 and 42 U.S.C. §1983.

ARGUMENT

I. THE DECISION OF THE ELEVENTH CIRCUIT IN LEWIS v. HILLSBOROUGH TRANSIT AUTHORITY IS CONTRARY TO THIS COURTS' HOLDING IN MONROE V. PAPE AND PATSY V. BOARD OF REGENTS OF THE STATE OF FLORIDA

The Eleventh Circuit Court of Appeals in denying the Petitioners request for a rehearing acted in contradiction to the holding of this Court in Monroe v. Pape and Patsy v. Board of Regents of the State of Florida. The Eleventh Circuit based its denial of Petitioner, Willie Lewis' request for a rehearing of his appeal upon the existence of elaborate grievance procedures found in the bargaining agreement between Lewis' union and the Defendant HTA's predecessor, the City of Tampa, and upon the availability of the City of Tampa's civil service regulations. Because the Eleventh Circuit repeatedly noted the existence of the detailed procedures, while steadfastly refusing to acknowledge evidence in the trial record that these procedures did not in fact work in Willie Lewis' case, Petitioner respectfully submits that the Eleventh Circuit's decision is in contradiction with Monroe v. Pape, 365 U.S. 167 (1961), and Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982).

In Monroe v. Pape, the United States Supreme Court reversed a lower courts dismissal of Monroe's §1983 action

against members of Chicago's police force. The Chicago police had broken into Mr. Monroe's home at night without either an arrest warrant or a search warrant. While in the home, the police ransacked Monroe's belongings, and subjected he and his family to humiliation. Even though Illinois had a law against unreasonable search and seizure, the Supreme Court held that Monroe could assert his federal claim regardless of any available state remedy. The Monroe court reasoned that the federal remedy is supplementary to the state remedy, and that it is not necessary that a state remedy be first sought and refused before the federal one is invoked. Monroe v. Pape, 365 U.S. 183. In Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982), the Supreme Court reached the same result, and held that the petitioner need not exhaust all of her state administrative remedies prior to bringing a §1983 action in federal court.

In reaching its decision in Monroe v. Pape, the Supreme Court reviewed in detail the legislative history of 42 U.S.C. § 1983. Writing for the Court in Monroe, Justice Douglas reasoned that 42 U.S.C. §1983 has three main aims: first, it overrides certain kinds of state laws; second, it provides a remedy where state law is inadequate; and, third, it provides a remedy where state law is adequate in theory,

but is not available in practice. Monroe v. Pape, 365 U.S. 167 173, 1744 (1982).

It is to fulfill the third aim of Monroe that Petitioner prays the court to grant his petition for certiorari. The Petitioner submits that while the supposedly constitutionally adequate grievance procedures may have provided others with due process, the Eleventh Circuit overlooked the fact that the HTA did not give Mr. Lewis the opportunity to respond to the reasons for his dismissal. The record clearly demonstrates that Mr. Lewis requested his Union President's help in initiating grievance procedures; however, his request was denied. (Tr. 55). Since his Union refused to help him, Mr. Lewis directed his attorney to request a formal hearing from the HTA. (Tr. 13). Although this remedy was still available pursuant to the City of Tampa Civil Service Rules (Tr. 26-7, 31-2), Mr. Moffitt of the Defendant HTA denied Mr. Lewis' request. It is of particular importance to note that the HTA refused to initiate the administrative remedy process per Mr. Lewis' attorney's written request, even though Mr. Moffitt testified that just about anything would trigger the grievance machinery. (Tr. 105).

After two unsuccessful attempts of using administrative remedies, Mr. Lewis finally commenced his §1983 action in federal court alleging that he was deprived of an adequate opportunity to rebut the reasons for his discharge, either before or after the HTA terminated his employment. Since it is readily apparent that the grievance procedures were adequate in theory only, the Petitioner respectfully submits that Monroe should control in the case at bar.

The Eleventh Circuit in opinion denying the Petitioner's request for rehearing stated that exhaustion did not enter into their decision, rather, the facts of the case at bar fit into the mold of Parratt v. Taylor, 451 U.S. 527 (1981). Exhaustion did not apply to the Parratt line of cases because the courts decided the cases on the merits of whether the available state remedies were constitutionally sufficient to provide due process. In the Parratt line of cases, the Petitioners were provided with an adequate opportunity to respond after they were deprived of their protected property interests. The case at bar does not fit within the Parratt line because the Petitioner was not allowed the opportunity to respond. In regard to Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982), the Eleventh Circuit explicitly held that Patsy was

not applicable to the case at bar because instead of dismissing for failure to exhaust, the court held against Lewis on the merits because the available, yet unused, state remedies comported with due process. Lewis v. Hillsborough Transit Authority, slip op. at 1964. As stated earlier, the record reflects that the circuit court's holding is incorrect.

The Eleventh Circuit's holding in Lewis advances a confusing, irrational argument that turns this Courts decision in Patsy upside down. This Court explicitly stated in Patsy that exhaustion of state administrative remedies is not a prerequisite to maintaining an action under 42 U.S.C. §1983. Although the court below was correct in stating that the district court did not immediately dismiss the Petitioner's §1983 action for not exhausting the grievance procedures, the district court ultimately held that the Petitioner could not prevail in his action because he failed to exhaust the grievance procedures. Clearly, the effect of the district court's decision was the same as if the court had dismissed the Petitioner's complaint for failing to exhaust his state administrative remedies.

In an attempt to justify its decision in Lewis, and to take the case outside the parameters of Patsy, the Eleventh

Circuit stated that Lewis was decided on the merits of whether there was a due process violation. The Court further stated that "Lewis does not contend that the procedures available to him were inadequate or unconstitutional." Lewis, slip op. at 1965. The statement of the court is without merit. The Petitioner argued in both his initial brief and his reply brief that as consequence of the transition of ownership of the bus system from the City of Tampa to the HTA, the grievance machinery was in a state of disarray, and that he was deprived of due process. Brief for Appellant, at 19, and Reply Brief of Appellant, at 8, Lewis v. Hillsborough Transit Authority, Id. Consequently, the Eleventh Circuit could not have decided Lewis on the merits, rather, the Eleventh Circuit Court of Appeals has attempted to reassert the exhaustion doctrine in contradiction to the holding of this Court in Patsy. Therefore, the Petitioner prays that this Court grant his Petition for Certiorari so that the holding of this Court in Patsy can be clarified in light of the lower court's decision in Lewis. The confusion created by Lewis over the issue of exhaustion must be remedied so that future litigants will know whether they must first use state administrative remedies before pursuing a §1983 action.

II. THE LAW TO BE APPLIED BY THE FEDERAL IS THE LAW OF THE STATE, THEREFORE, THE CIRCUIT COURT ERRED BY NOT APPLYING THE PROVISIONS OF FLORIDA STATUTE §447.401.

The United States Supreme Court held in Erie Railroad Company v. Tompkins, 304 U.S. 64 (1939) that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. The circuit court in its opinion affirming the holding of the district court stated: "if Lewis in fact could elect his remedies, that only indicates that he had more, not less, procedural safeguards." Lewis, slip op. at 1961. However, the circuit court failed to apply the critical provision of Florida Statute §447.401 which states that if an individual chooses one remedy, he is precluding from using the other.

According to the provisions of Florida Statute §447.401:

> ". . . a career service employee shall have the option of utilizing the civil service appeal procedure or a grievance procedure established under this section, but such employee cannot use both a civil service appeal and a grievance procedure." Fla.Stat.Ann. §447.401 (West).

The Florida Second District Court of Appeals interpreted Florida Statute §447.401 in Public Employee Relations

Commission v. District School Board, 374 So.2d 1005 (2nd DCA 1974), and stated that the use of one appeal procedure precludes the use of the other procedure.

Under Florida Law the Petitioner clearly has a choice of remedies. The Petitioner retained his choice of remedies even after ownership of the HTA was transferred from the City of Tampa to HTA. This choice was guaranteed by the provision of the collective bargaining agreement which stated that the HTA's employees affected by the transfer in ownership could suffer no worsening of their conditions of the employment. When the Petitioner chose to request an administrative hearing instead of proceeding through grievance procedures, he was precluded by Florida law from the using the grievance procedures.

The circuit court failed to apply the provisions of Florida Statute §447.401. Instead of ruling that the Petitioner was precluded from using the grievance procedures, the circuit court held that the Petitioner has more procedural safeguards, and his due process rights were not violated. The circuit court's ruling is in contradiction to the holding of this Court in Erie. In Erie, the Petitioner was injured in Pennsylvania when he was struck by a door of the Defendant's train as he walked on a

path which was along side railroad tracks. The Supreme Court held that the circuit court had to apply the law of the state, and could not apply federal common law. In the case at bar, by affirming the ruling of the District Court that the Petitioner was not precluded from using the grievance procedures, the circuit court failed to apply Florida law, and contradicted the ruling of this Court in Erie. Consequently, Petitioner's Petition for Certiorari should be granted so that the error created by the circuit court's ruling can be remedied, and the resulting uncertainty can be obviated.

CONCLUSION

Because the Eleventh Circuit Court of Appeals' decision appears to contradict this Court's decision in Monroe v. Pape, Patsy v. Board of Regents of the State of Florida and Erie Railroad Company v. Tompkins, the Supreme Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Gary Nicholson, Esq., 3002 W. Kennedy Blvd., 1639, Tampa, Florida, 33602 on this 7th day of May, 1984.

CAROLYN J. HOUSE, ESQ.

Willie L. LEWIS, Plaintiff-Appellant,

v.

HILLSBOROUGH TRANSIT AUTHORITY et al., Defendants-Appellees.

No. 83-3156

Non-Argument Calendar.

United States Court of Appeals, Eleventh Circuit.

Dec. 5, 1983.

Terminated county transit authority bus driver brought section 1983 action, alleging that he had been denied his constitutional rights to due process when he lost his job. After nonjury trial, the United States District Court for the Middle District Court of Florida, William J. Castagna, J., found for defendants, and bus driver appealed. The Court of Appeals held that: (1) bus driver was not denied due process by county transit authority, but, in fact, was provided with adequate notice of reasons in termination letter and had effective opportunity under posttermination grievance procedure in collective bargaining agreement to rebut those reasons, but simply failed to take advantage thereof; (2) driver could not complain about alleged deficiencies in union grievance procedure which he did not attempt to utilize; (3) county transit authority, though not

a party to collective bargaining agreement, could utilize provisions thereof relating to voluntary resignation; (4) driver's conduct warranted finding that he had resigned; and (5) whether or not coemployees observed anything to indicate that driver was unable to work was irrelevant to propriety of finding of voluntary resignation, which was result not of perceived lack of injury but of driver's failure to ever notify transit authority of reasons for his absence.

Affirmed.

Rehearing denied, 11 Cir., ____ F.2d ____.

1. Constitutional Law 275(5)

Terminated bus driver was not denied due process by county transit authority but, in fact, was provided with adequate notice of reasons in termination letter and had effective opportunity under posttermination grievance procedure in collective bargaining agreement to rebut those reasons; any deprivation of due process resulted from driver's own inaction in failing to invoke his rights under the union grievance system. U.S.C.A. Const.Amend. 14.

2. Labor Relations 416.1

Terminated county transit authority bus driver could not complain about any alleged deficiencies in union grievance procedure, since he did not file any grievance prior to commencing section 1983 action in district court, nor did he show that his failure to file a grievance was result of any shortcomings in grievance provisions of collective bargaining agreement. 42 U.S.C.A. §1983.

3. Labor Relations 262

Where collective bargaining agreement contemplated change in ownership of bus system from city to county transit authority, transit authority was entitled to utilize provisions of the agreement relating to voluntary resignation to effect termination of driver, though transit authority was not itself a party to the agreement.

4. Labor Relations 257

Even if county transit authority bus driver did not subjectively intend to resign his job, he nonetheless did so by his own inaction under terms of collective bargaining agreement relating to voluntary resignation, by virtue of facts that, though having knowledge of agreement's provisions, driver never notified transit authority of

doctor's advice not to return to work and did not transmit contents of doctor's note to transit authority.

5. Labor Relations 257

Whether or not county transit authority employees observed anything to indicate that driver, who periodically came into office after bus accident, was unable to work was irrelevant to propriety of driver's termination, which was result not of perceived lack of injury but of driver's failure to ever notify transit authority of reasons for his absence, namely, doctor's advice that he not return to work.

Appeal from the United States District Court for the Middle District of Florida. agreement.

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

Willie L. Lewis instituted this suit in the United States District Court for the Middle District of Florida, alleging that he had been denied his constitutional rights to due process when he lost his job as a bus driver for the

Hillsborough Transit Authority (HTA). 42 U.S.C. § 1983. After a nonjury trial, the district court, finding no constitutional violation, found for the defendants and Lewis appeals. We affirm.

The City of Tampa hired Lewis as a bus driver in 1971. The city and the Amalgamated Transit Union (Union) signed a collective bargaining agreement (agreement) in December, 1979. Tampa and Hillsborough County formed the HTA which took over the operation of the bus system in March, 1980. The agreement, when made, anticipated the formation of HTA and provided that the employees "shall suffer no worsening of their wages, hours, and other conditions of employment . . ." because of the transition. Agreement at Article 42.7. The agreement also set out a grievance procedure, id. at Article 6, and disciplinary provisions, which stipulated in part that if an employee was absent without leave for three consecutive days, he "may be considered as 'resigned without notice.'" Id. at Article 7.4

Lewis was involved in an accident on June 11, 1981 while driving a bus. He was taken to the hospital and released the same day. Lewis then made an appointment with Dr. Angelo M. Alves, his personal physician, for July 2, 1981. Fireman's Fund Insurance Company (Fireman's Fund),

HTA's workmen's compensation carrier, advised Lewis that it had made an appointment for him to see Dr. James Eckart, also for July 2, 1981. Lewis stated that he told Fireman's Fund he did not intend to claim workmen's compensation and asked Fireman's Fund to cancel the appointment with Dr. Eckart. Lewis apparently did not receive the notification of cancellation in time. In any event, he saw both Dr. Eckart and Dr. Alves.

Dr. Eckart found no physical evidence of injury and testified by deposition that he told Lewis he could return to work. Dr. Alves advised Lewis that he should not work for at least a month and gave Lewis a note to this effect. Lewis took Dr. Alves' note to his attorney. Both doctors filed reports with Fireman's Fund. Relying on Dr. Eckart's diagnosis, Fireman's Fund determined that Lewis could return to work and so notified both Lewis and the HTA. Lewis, however, chose to follow Dr. Alves' recommendation and remained off the job. Although Lewis admitted that on previous occasions he had told his employer the reason for his failure to report for work, Lewis never informed the HTA of Dr. Alves' diagnosis. Lewis twice went to the HTA offices to fill out some forms and he spoke to some HTA employees, but he never gave a reason for his absence.

Because he had been absent without leave for more than three days, Joseph Moffett, HTA's Manager of Safety and Training, sent Lewis a letter on July 27, 1981, stating that he was considered as having voluntarily resigned under Article 7.4 of the agreement.

Upon receiving the letter, Lewis met with the president of the union local who told Lewis that he could not help him because he had retained an attorney. Lewis' attorney then wrote to Moffett, stating that Lewis had not resigned, but was only following Dr. Alves' advice. The attorney also requested a formal hearing. Moffett replied that, because Lewis had not notified the HTA of Dr. Alves' diagnosis, he was still considered as having resigned. Lewis then filed this suit.

The district court concluded that Lewis had a property interest in continued employment because of his status as a civil servant and his rights under the collective bargaining agreement. The court, however, found no violation of due process because Lewis resigned by his own inaction and was not terminated. Also, even if he had been terminated, Moffett's letter furnished adequate notice of the reasons and the grievance procedure in the agreement provided Lewis

with an effective opportunity to rebut the reasons for his dismissal. Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980).

[1] Lewis urges that the mere availability of a post-termination grievance procedure cannot cure the alleged denial of due process. He admits that the grievance procedure, if utilized, could eliminate a constitutional violation. Id. To accept Lewis' argument would permit every employee to ignore the elaborate grievance mechanism provided in the agreement and to sue in federal court. In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the United States Supreme Court held that, although Nebraska may have deprived an inmate of property, the states "has provided respondent with the means by which he can receive redress for the deprivation . . . . This procedure was in existence at the time of the loss here in question but respondent did not use it." Id. at 543, 101 S.Ct. at 1917, 68 L.Ed.2d at 433. Lewis, therefore, had an opportunity to rebut the charges. As the district court state, "[d]ue process was at Plaintiff's disposal; any deprivation of that due process clearly resulted from Plaintiff's own inaction." Opinion at 5.

[2] Lewis also claims that the union grievance procedure was not open to him because he had elected to use

the Tampa Civil Service appeal procedures and the union grievance apparatus was in disarray due to the transition to the HTA. The HTA contends that there is conflicting evidence whether Lewis could proceed under the Tampa Civil Service rules. If Lewis in fact could elect his remedies, that only indicates that he had more, not less, procedural safeguards. With respect to the alleged disarray in the union grievance system, Moffett testified that union members were filing grievances, which were being processed promptly. Transcript at 113. Lewis cannot complain about any alleged deficiencies in the grievance procedure because he did not file a grievance, nor did he show that his failure to file a grievance was the result of any shortcomings of the grievance provisions.

[3] Because the HTA was not a party to the agreement, Lewis contends that it cannot resort to Article 7.4 to avoid liability. The agreement was in effect between December 2, 1979, and September 30, 1981 and the HTA took over the bus system on March 1, 1980. The City of Tampa, which was a party to the agreement, and Hillsborough County, created the HTA. By its express terms, the agreement contemplated the change of ownership to the HTA. See Article 42.7. As the

district court held, the HTA correctly applied the procedures mandated by Article 7.4 of the agreement.

[4] Lewis disputes the district court's finding that he resigned. He maintains that the HTA only used Article 7.4 in an effort to terminate him. Lewis had knowledge of the agreement's provisions. He admitted that he had told his employer the reasons for previous absences, that he never notified the HTA of Dr. Alves' diagnosis, and that there was no reason why he did not transmit the contents of the doctor's note to his employer. Transcript at 47. Even if Lewis may not have subjectively intended to resign his job, he did so under the terms of the agreement by his own inaction.

[5] Finally, Lewis challenges as clearly erroneous the district court's finding that the HTA's employees observed nothing to indicate Lewis' inability to work when he came to the offices. Whether it is clearly erroneous does not affect the outcome of this case because the fact remains that Lewis failed to notify the HTA of the reasons for his absence.

The judgment of the district court is AFFIRMED.

Willie L. LEWIS, Plaintiff-Appellant,
v.

HILLSBOROUGH TRANSIT AUTHORITY,
et al., Defendants-Appellees.

No. 83-3156.

United States Court of Appeals,
Eleventh Circuit.

March 9, 1984.

Former city transit authority employee sued the authority charging violation of due process in concluding that employee had resigned without notice without first furnishing him a hearing. The United States District Court for the Middle District Court of Florida, William J. Castagna, J., found against former employee, and he appealed. The Court of Appeals, ____ F.2d ____, affirmed. On petition for rehearing en banc, the Court of Appeals, treating petition as one seeking reconsideration of panel opinion, held that bargaining agreement, and arguably, state civil service regulations provided all the due process necessary.

Rehearing denied.

1. Courts 90(2)

Filing of suggestion for rehearing en banc does not

take the case out of plenary control of the panel deciding the case and the panel may, on its own, grant rehearing and may do so without action by the full court, U.S.Ct. of App. 11th Cir.Rule 26(f), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

2. Constitutional Law 305(2)

Where collective bargaining agreement between city and transit union and, arguably, state civil service regulations provided former transit authority employee with the procedural remedies which he failed to pursue, the employee, who brought Civil Rights Act suit claiming that transit authority violated due process rights when it concluded he had resigned without notice without first furnishing him hearing, had been afforded all the due process necessary under the Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion December 5, 1983, 11th Cir., 1983, ___ F.2d ___).

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

[1] Willie Lewis petitions for a rehearing en banc of this panel's opinion in Lewis v. Hillsborough Transit Authority, No. 83-3156, slip op. at 1959, ____ F.2d ____ (11th Cir. Dec. 5, 1983.[1/] While he does not seek reconsideration of the panel opinion, we treat his petition as such in accordance with Eleventh Circuit Rule 26(f).[2/] Rule V.C.b. (1) of our Internal Operating Procedures also confers on the panel continuing control of the case although the petition seeks en banc consideration only.[3/]

1/ The facts of this case are set out in the panel opinion.

2/ "A suggestion for rehearing en banc will also be treated as a petition for rehearing before the original panel.." 11th Cir.R. 26(f).

3/ Panel Has Control - Although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the court, the filing of a suggestion for rehearing en banc does not take the case out of plenary control of the panel deciding the case. The panel may on its own, grant rehearing and may do so without action by the full court.
11th Cir. Internal Operating Procedures R. V.C. b.(1).

In his petition Lewis argues for the first time that our prior opinion conflicts with Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In Patsy, the Supreme Court held that exhaustion of state administrative remedies is not a prerequisite to a suit brought pursuant to 42 U.S.C. § 1983.

Lewis claimed the Hillsborough Transit Authority violated his constitutional right to due process when it concluded he had resigned without notice without first furnishing him a hearing. The collective bargaining agreement between the City of Tampa and the Amalgamated Transit Union, and arguably the Florida Civil Service regulations, provided Lewis with procedural remedies which he failed to pursue. Our opinion, however, did not require Lewis to exhaust these administrative remedies, but instead held that they afforded him all the due process necessary under the fourteenth amendment. The claim was rejected on the merits for failure to state a constitutional violation.

The Supreme Court, in a line of procedural due process cases, looked to the available state remedies to determine whether they provided sufficient due process to satisfy the Constitution. See e.g., Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); Ingraham v. Wright,

430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). These cases involved whether there was a constitutional violation, not whether there was exhaustion. Instead of dismissing for failure to exhaust, the Court held against the claimant on the merits because the available, yet unused, state remedies comported with due process.

In Lewis, the district court held that the available remedies complied with due process requirements. "Due process was at Plaintiff's disposal; any deprivation of that due process clearly resulted from Plaintiff's own inaction." Opinion at 5. The district court then found that Lewis had failed to show a denial of due process under the fourteenth amendment. The panel opinion agreed that Lewis had been afforded sufficient due process. Lewis thereby fits under the Parratt line of cases instead of Patsy.

The United States Court of Appeals for the Fourth Circuit addressed the relationship between Parratt and Patsy in Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983). The court stated that:

> Exhaustion of state judicial or administrative remedies is not a prerequisite to section 1983 actions, Monroe v. Pape, 365 U.S. 167, 183 [8] S.Ct. 473, 482, 5 L.Ed.2d 492] (1961), except for

> those cases falling under the narrow exhaustion scheme embodied in 42 U.S.C. § 2997. See Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 102 S.Ct. 2557 [73 L.Ed.2d 172] (1982). Parratt does not change this rule. An exhaustion requirement would merely require a plaintiff to exhaust his state remedies before bringing a section 1983 action in federal court. Parratt, by contrast, stands for the proposition that a plaintiff may sue only in state court if he fails to state a procedural due process claim under section 1983. Unlike an exhaustion requirement, which is based upon principles of comity, the Parratt analysis is based upon the concept that there is no constitutional violation if a plaintiff has not been deprived of a protected interest without due process of law.

Id. at 794, n. 1.

[2] Lewis does not contend that the procedures available to him were inadequate or unconstitutional. They provide him with an effective opportunity to rebut the

charges. As such, Lewis' case was not dismissed for lack of jurisdiction for failure to exhaust. He lost on the merits for lack of a constitutional violation.

Lewis emphasizes one sentence in the panel opinion. "To accept Lewis' argument would permit every employee to ignore the elaborate grievance mechanism provided in the agreement and to sue in federal court." Slip op. at 1961, at _____. This statement does not mean, as Lewis maintains, that we required exhaustion. This is not an exhaustion case. We considered the available remedies only to the extent necessary to determine if they satisfied the due process requirements of the fourteenth amendment. Exhaustion did not enter into the analysis.

Lewis raises another argument based on Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1189 (1938). We find this contention also without merit. It is illogical to assert that a choice or remedies, albeit exclusive of one another, furnishes less, rather than more, procedural safeguards than one remedy.

For the foregoing reasons, a rehearing of the panel opinion is DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE LEWIS,	)	CASE NO. 81-885-Civ-T-WC
Plaintiff,	)	
vs.	)	
HILLSBOROUGH TRANSIT AUTHORITY,	)	
Defendant.	)	

OPINION

This cause came on before the Court on a non-jury trial on October 12, 1982. Plaintiff Willie Lewis filed this action against the Hillsborough Transit Authority, alleging that Defendant unconstitutionally deprived him of a property right stemming from his interest in continued employment.

The Court has reviewed the evidence and exhibits presented at trial, together with the post-trial submissions of the parties, and makes the following findings:

(1) Prior to trial, Plaintiff voluntarily amended his Complaint, striking claims against individual Defendants and striking claims for punitive and general damages. The parties agreed to proceed to a non-jury trial.

(2) Plaintiff Willie Lewis was employed as a bus driver by the City of Tampa in 1971. On March 1, 1980,

while Plaintiff was still employed by the transit system, the Defendant Hillsborough Transit Authority succeeded the City of Tampa in operation of the bus system. Although Plaintiff asserted that Defendant entered into a federal funding agreement and thus was subject to the Federal Mass Transportation Act of 1964, 49 USC § 1609 (c), no evidence was adduced at trial to sustain the contention that Defendant accepted any federal funding for the bus system. Therefore, the provisions of the Federal Mass Transportation Act have no bearing on whether Plaintiff possessed a property interest in his continued employment.

(3) On June 11, 1981, Plaintiff Lewis sustained an injury during the course of his employment. On July 2, 1981, Plaintiff consulted two physicians. One physician, Dr. Angelo Alves, advised Plaintiff not to return to work for one month. The other physician, Dr. James Eckart, whom Plaintiff saw at the request of Defendant's workers' compensation carrier, advised him to return to work the following day. Neither physician reported his findings to Defendant. Plaintiff chose to follow Dr. Alves' advice but failed to inform Defendant that he would not return to work until August. Subsequently, in late July, 1981, Plaintiff appeared at Defendant's offices on two occasions to complete

some wage statement forms. At that time representatives of Defendant spoke to Plaintiff and observed nothing about his appearance that would cause them to conclude that Plaintiff was unable to work.

(4) A crucial fact that emerged at trial was that Plaintiff took absolutely no action to notify Defendant of his medical condition or the reasons for his absence. Accordingly, on July 27, 1981, Mr. Joseph Moffitt, Safety and Training Manager of Defendant Hillsborough Transit Authority, advised Plaintiff by letter that Plaintiff had been absent from work without leave for more than three consecutive days and thus was considered to have voluntarily resigned his employment. Mr. Moffitt acted in accordance with Paragraph 7.4 of the Collective Bargaining Agreement between the City of Tampa and the Amalgamated Transit Union Local 1464, which provided that an "employee who is absent without leave for three (3) consecutive days may be considered as 'resigned without notice.'"

(5) On the date of Mr. Moffitt's letter to Plaintiff Lewis, the Hillsborough Transit Authority had succeeded the City of Tampa in operation of the bus system. After the creation of the Hillsborough Transit Authority on March 1, 1980, and at the time of all events relevant to this action,

the Hillsborough Transit Authority and Local 1464 continued to honor the terms and conditions of the union contract. Therefore, Mr. Moffitt's action under Paragraph 7.4 of the agreement was appropriate.

(6) On August 3, 1981, Plaintiff's attorney responded to Mr. Moffitt's letter and requested that Plaintiff receive an administrative hearing. Plaintiff at no time institute a grievance as provided for in Paragraph 6.4 of the collective bargaining agreement. The letter written by Plaintiff's attorney did not comply with the grievance procedure, nor would it have complied if Plaintiff himself had written it.

Based on the foregoing findings of fact the Court makes the following conclusions of law:

(1) Plaintiff's claim to a property interest in his continued employment is to be determined by reference to state law. See Ogletree v. Chester, 682 F2d 1366, 1368 (11th Cir. 1982); Glenn v. Newman, 614 F2d 467, 471 (5th Cir. 1980). Plaintiff was a vested civil servant of the City of Tampa whose rights were determined by a board authorized under Article III, Section 14 of the Constitution of the State of Florida. The collective bargaining agreement between the City of Tampa and Local 1614 specifically provided in Paragraph 42.7 that "the employees

in the bargaining unit affected by the transition [to public ownership of the bus system by the Hillsborough Transit Authority] shall suffer no worsening of their wages, hours and other conditions of employment including, but not limited to pension rights and seniority." Plaintiff's status as a civil servant and the rights accruing to him under the collective bargaining agreement substantiate his claim to a constitutionally protected property interest.

(2) Plaintiff was not deprived of his constitutional right to due process. The minimum due process required includes, "prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal means giving the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision. Glenn v. Newman, 614 F2d at 472. First, Plaintiff really was not terminated; instead, by his own failure to act he "resigned without notice." Second, even assuming that Plaintiff was terminated by Defendant. Mr. Moffitt's letter to Plaintiff constituted adequate written notice of the reasons for termination. Finally, due process does not require that the terminated employee be given a hearing in every instance;

rather, he must be given "an effective opportunity to rebut" the reasons for his termination. The grievance procedure outlined in Paragraph 6.4 of the collective bargaining agreement provided Plaintiff with this opportunity. Due process was at Plaintiff's disposal; any deprivation of that due process clearly resulted from Plaintiff's own inaction.

Judgment will be entered in accordance with this Opinion.

DONE AND ORDERED at Tampa, Florida this 8th day of December, 1982.

s/WILLIAM J. CASTAGNA
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States , and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities cf citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Amend. XIV

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to any party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983

447.01 Grievance Procedures

Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees, involving the interpretation or application of a collective bargaining agreement. Such grievance procedure shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties. However, an arbiter or other neutral shall not have the power to add to, subtract from, modify, or alter the terms of a collective bargaining agreement. If an employee organization is certified as the bargaining agent of a unit, the grievance procedure then in existence may be the subject of collective bargaining, and any agreement which is reached shall supersede the previously existing procedure. All public employees shall have the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization. A career service employee shall have the option of utilizing the civil service appeal procedure or a

grievance procedure established under this section, but such employee cannot use both a civil service appeal and a grievance procedure.

FLA. STAT. §447.401(1981)